Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re	)	
	)	
Review of the Prime Time	)	MM Docket No. 94-123
Access Rule, Section 73.658(k) of the	)	
Commission's Rules	)	

REPLY COMMENTS

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TABLE OF CONTENTS

SUMMARY

The parties challenging PTAR on First Amendment grounds evade settled questions of law. Thus, the outcome of their challenges is manifest: the scarcity rationale of *Red Lion* is the controlling law, and as such, it follows that PTAR is a constitutional broadcast regulation.

It is unassailable that *Red Lion* remains the controlling law. That case articulated the principle that public trustee obligations, like PTAR, imposed on broadcasters in exchange for exclusive use of scarce spectrum, are a constitutionally permissible form of regulation. PTAR's opponents have offered not a shred of language from any Supreme Court opinion that demonstrates otherwise. Moreover, there has been recent reaffirmation of the continuing relevance and soundness of this scarcity rationale from both the Court and Congress.

Opponents of PTAR rely heavily on the Commission's 1987 *Syracuse Peace Council* decision, hoping to portray it as a Commission determination that the scarcity rationale is obsolete. But they dodge a critical point: it is for the Supreme Court, not for the Commission, to overturn its own precedent. The *Syracuse* opinion shows deference to the Court, merely suggesting that "it would be ***desirable*** for the Supreme Court to ***reconsider***" its adherence to scarcity rationale. But in any event, even if the Commission had the ability to overrule Supreme Court precedent, the relevant committees of both houses of Congress have unambiguously discredited the factual premises of *Syracuse Peace Council* and the *1985 Fairness Report* upon which it is based. Finally, the commenters flat out misread the Commission's position in *Syracuse*. While the Commission purported to stop enforcing the fairness doctrine on public interest and constitutional grounds, it did not rule that *all* public trustee regulation is constitutionally infirm. Indeed, the FCC found that it could - and would - continue to regulate broadcasters under the public interest standard.

First Media's argument that the *Turner* decision did not reaffirm the scarcity rationale because the Court was not directly confronted with the question, *id.* at 3, relies on a single statement isolated from the totality of the Court's opinion. At the very least, eight justices recognized and affirmatively acknowledged that broadcasting is treated differently than cable under the First Amendment, and that *Red Lion* and its underlying scarcity rationale are still the controlling law. Even assuming, *arguendo*, that the Court's discussion of *Red Lion* was not essential to the outcome of the case, it makes plain the Court's understanding that *Red Lion* and its progeny remain valid.

PTAR's critics also argue that the factual premises underlying *Red Lion* have changed. They tirelessly recite a litany of threadbare allegations that an increase in the number of alternative video delivery systems make scarcity rationale obsolete. But these other video providers have not even begun to supplant the unique role broadcasting plays in the marketplace of ideas. Moreover, with advertisers paying record-high prices for broadcast licensees' time and with spectrum auctions for non-broadcast uses fetching heretofore unimagined sums, it is clear that the demand for spectrum continues to exceed the supply.

Even if the Commission could lawfully discard the notion of scarcity, it would jeopardize the soundness, from a First Amendment perspective, of all broadcaster public interest obligations. For example, the obligation to provide children's programming could be found an impermissible content-based regulation. Rules designed to promote diversity through encouraging ownership by minorities and women and preventing undue concentrations of ownership would no longer be justified. Instead of helping to realize the potential of the mass media to enlighten and inform, the Commission's role would become merely custodial - little more than spectrum allocation.

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Media Access Project and People for the American Way ("MAP/PFAW") respectfully submit reply comments in the above proceeding. MAP/PFAW have fully addressed the policy questions underlying the Prime Time Access Rule ("PTAR") in their comments. Thus, MAP/PFAW will confine their reply comments to the First Amendment challenges to PTAR.

The parties challenging PTAR on First Amendment grounds evade long-settled questions of law. It is unassailable that *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), remains the controlling law. That case articulated the basic precept that public trustee obligations, like PTAR, imposed on broadcasters in exchange for exclusive use of scarce broadcast spectrum, are a constitutionally permissible form of regulation. PTAR's opponents have offered not a shred of language from any Supreme Court opinion that demonstrates otherwise. Moreover, there has been recent reaffirmation of the continuing relevance and soundness of this scarcity rationale from the Court and the Congress.

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I. THE PUBLIC TRUSTEE STANDARD, AS SET FORTH IN RED LION, IS STILL THE CONTROLLING LAW FOR FIRST AMENDMENT EVALUATION OF BROADCAST REGULATION.

That *Red Lion v. FCC* is still good law is undeniable. Far from overruling it, it has placed continued reliance upon it. The Commission's *Syracuse Peace Council* decision could not, and did not, overrule it. Despite the best efforts of PTAR's opponents to ignore it or bypass it,[1] the *Red Lion* standard of relaxed scrutiny for broadcast regulations applies to PTAR.[2]

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[1]For example, the Freedom Forum recites a litany of newspaper tax cases for the proposition that "[t]he [Supreme] Court has repeatedly invalidated government regulations that targeted a specified segment of the press for disfavored treatment." Freedom Forum Comments at 3. But these, and other cases involving the First Amendment rights of the printed press, have *never* been held to apply to broadcasting. Indeed, the Court more recently declined to apply such cases to cable, which is subject to a higher level of First Amendment scrutiny than broadcast. *Turner*, 114 S.Ct. at 2466.

A. The Supreme Court Has Reaffirmed *Red Lion* And Its Enunciation Of The Scarcity Rationale Time And Time Again.

First Media relies on a footnote in *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n. 11 (1984), in attempting to show that the Court will vacate the scarcity rationale at any signal from the FCC - that it is "a technological matter within the special expertise of this agency." First Media Comments at 4. But this highlights a critical point: it is for the Supreme Court, not for the Commission, to overturn its own precedent. Whether the scarcity rationale is still a valid basis for broadcast regulation is not a technical matter for the Commission, but rather one of *stare decisis* and constitutional interpretation for the Supreme Court.

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[2]Several commenters advance the argument that tougher First Amendment scrutiny should apply to PTAR. They mistakenly assert that PTAR discriminates among classes of speakers and that therefore strict scrutiny should apply. *See* Freedom Forum Comments at 3-5, FEF Comments at 4-5, Media Institute Comments at 5-6.

These arguments are unsupported. On the contrary, *Mt. Mansfield* has already determined that the *Red Lion* public trustee standard should apply to PTAR, and the D.C. Circuit upheld the rule under that standard. *Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971). This decision has never been overruled.

Apparently believing that the FCC is not bound by judicial precedent, however, FEF and Freedom Forum ignore *Mt. Mansfield* and press onward. Relying heavily on a non-broadcast case, *Buckley v. Valeo*, 424 U.S. 1 (1976), they suggest that PTAR discriminates among classes of speakers because it favors independent stations over affiliates, or independent producers over network producers. FEF Comments at 8, Freedom Forum Comments at 3. But the Supreme Court, interpreting *Buckley*, has discredited their "broad assertion that all speaker-partial laws are presumed invalid." *Turner*, 114 S.Ct. at 2467. Instead, it determined that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the ***substance*** of what the favored speakers have to say...." *Id.* [emphasis added.]

PTAR does not express a preference for the substance of what is said. Instead, it distinguishes between groups of speakers to foster an overall diversity of programming. *Mt. Mansfield*, 442 F.2d at 480; *NOPR* at 6333-36. The fact that the exemptions to the rule are directed toward categories of shows does not change this. *See* FEF Comments at 7. The exemptions do not specify any particular viewpoints, messages, or manners of expression, but instead apply to entire categories of programming. *See Turner*, 114 S.Ct. at 2460-61. (Speaker distinctions not presumed invalid where objective of rule was not "to favor programming of a particular subject matter, viewpoint, or format....")

Moreover, in case after case, the Supreme Court has followed *Red Lion* and found that the scarcity rationale continues to justify broadcast regulation. Thus, the outcome of the issue in this inquiry is manifest: the scarcity rationale of *Red Lion* is the controlling law, and as such, it follows that PTAR is a constitutional broadcast regulation.

1. *FCC v. League of Women Voters of California*

Contrary to First Media's interpretation, *League of Women Voters*, taken as a whole, sounded a ringing reaffirmation of spectrum scarcity. The Court was confronted with a First Amendment challenge to a broadcast regulation, a ban on editorializing by public broadcasters, and upheld it. The lower court had applied a more exacting standard of scrutiny, noting, *inter alia*, that the regulation was not justified by any special characteristic of broadcast media. *League of Women Voters*, 468 U.S. at 374-375.

However, in finding that the "fundamental principles that guide our evaluation of broadcast regulation [were] by now well established," *Id.* at 377, the Court continued to use the *Red Lion* approach. The "fundamental distinguishing characteristic" of broadcasting, the Court found, was that frequencies are a "scarce resource." *League of Women Voters* at 377. So, despite acknowledging that scarcity rationale has its critics, *League of Women Voters* made plain the Court's intent to continue to apply a relaxed level of scrutiny, following the *Red Lion* standard.

Moreover, use of this footnote actually weakens First Media's own argument, because when read in this context, the FCC's opinion in *Syracuse Peace Council* could be seen as a "signal" from the FCC to abandon the scarcity rationale.[3] But the Court refused to grant

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[3]As MAP observes below, at pages 7-9, in *Syracuse* the Commission did not conclude that spectrum demand no longer exceeded supply, nor did it find that there was no longer support for its broadcast regulations. The most generous reading of the opinion will only find that it

certiorari in that case. *Syracuse Peace Council v. FCC*, 493 U.S. 1019 (1990). And, in several cases subsequent to *Syracuse*, the Court has cited *Red Lion* with approval. The inescapable conclusion is that, the *League of Women Voters* footnote notwithstanding, the Court still subscribes to validity of the scarcity rationale espoused in *Red Lion*.

2. *Metro Broadcasting v. FCC*

It is scarcely any wonder that the parties challenging PTAR here completely fail to mention *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), for this case resoundingly slams the door on their attempt to portray *League of Women Voters* and *Syracuse* as leading to a decision that scarcity rationale is obsolete.

The Supreme Court reaffirmed the scarcity rationale in *Metro* six years after *League of Women Voters* and shortly after it denied *certiorari* in Syracuse. The FCC policies at issue in *Metro* were economic regulations intended to increase diversity in the broadcast media, *Id.* at 556-63, and as such were strikingly similar in nature to PTAR.

Placing heavy reliance on *Red Lion*, the Court found that the regulation of broadcast licensees, which "safeguard[] the public's right to receive a diversity of views and information over the airwaves," had long been permitted "because of the scarcity of [electromagnetic] frequencies." *Id.* at 566, *citing Red Lion*, 395 U.S. at 390. Nowhere did it question the scarcity rationale's validity. Indeed, the Court found that the Commission's right to regulate broadcasters in the public interest was "axiomatic" and "an integral component of the FCC's mission." *Id.* at 567.

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represented a message encouraging the Supreme Court to revisit the use of the scarcity rationale to uphold broadcast regulations.

3. *Turner Broadcasting System v. FCC*

First Media asserts that the *Turner* decision did not reaffirm the scarcity rationale because the Court was not directly confronted with the question. First Media Comments at 3. It relies on an isolated statement - that the Court has "declined to question [the rationale's] continuing validity as support for [its] broadcast jurisprudence," and that it saw "no reason to do so here," - to mean that *Turner* did not consider whether the scarcity rationale is still valid. *Id.* at 3, *quoting Turner*, 114 S.Ct. at 2457.

While it is true that the *Turner* Court did not in an independent evaluation of the continuing validity of the scarcity rationale, it is clear from the totality of the Court's opinion that it considers *Red Lion* and its scarcity rationale to be the current law controlling broadcast regulation. Faced with the question of whether broadcast jurisprudence applied to the cable medium, the Court placed heavy reliance upon *Red Lion* when it stated:

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium....As a general matter, there are more would be broadcasters than frequencies available in the electromagnetic spectrum....The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.

Turner, 114 S.Ct. at 2456.

The Court also observed that

> [t]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees....As we said in Red Lion, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish...."

Id. at 2457, *citing Red Lion*, 395 U.S. at 390. [citations omitted.]

Thus, ***at the very least***, eight justices recognized and affirmatively acknowledged that broadcasting is treated differently than cable under the First Amendment,[4] and that *Red Lion* and its underlying scarcity rationale are still the controlling law. Even assuming, *arguendo*, that the Court's discussion of *Red Lion* was not essential to the outcome of the case, for purposes of determining the current First Amendment standard for broadcast regulation, it is apparent that the Court understands *Red Lion* and its progeny to be valid.[5]

B. PTAR's Opponents Overstate The Importance Of *Syracuse Peace Council.*

Opponents of PTAR rely heavily on *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *affirmed on other grounds sub nom., Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), hoping to portray it as a Commission determination that the scarcity rationale is obsolete. Freedom Forum Comments at 7 n.18; First Media Comments at 4. FEF notes, for example, that "[t]he Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions." FEF Comments at 12. And the Freedom Forum urges that *Syracuse Peace Council* stands for the proposition that the Commission has recognized that the scarcity rationale can no longer be used

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[4]The Court stated: "[c]able television does not suffer from the inherent limitations that characterize the broadcast medium****In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id.* at 2457.

[5]In fact, First Media itself has relied on non-essential findings to make its point. For example, it cites to a footnote in *FCC v. League of Women Voters* to establish that the Court would revisit spectrum scarcity upon a signal from the Commission or Congress. First Media Comments at 4.

to justify the regulation of broadcast television content. Freedom Forum Comments at 7.

As a preliminary observation, MAP/PFAW reiterate that a decision by the Commission cannot overrule Supreme Court precedent. MAP/PFAW have demonstrated, *supra*, at pages 2-7, that *Red Lion* controls on this issue, and that recent Supreme Court decisions placed continued reliance on a scarcity rationale. In fact, the *Syracuse* opinion shows deference to the Court, merely suggesting that "it would be ***desirable*** for the Supreme Court to ***reconsider***" its adherence to scarcity rationale. *Syracuse Peace Council*, 2 FCC Rcd at 5054.

Furthermore, as MAP has already demonstrated, the relevant committees of both houses of Congress have unambiguously discredited *Syracuse Peace Council* and the *1985 Fairness Report* upon which it is based. *See* MAP Reply Comments to PTAR Declaratory Ruling Proceeding at 18-20. And, as discussed in the MAP/PFAW Comments at pp. 24-27, *Syracuse Peace Council* is based upon two flawed propositions. The first is that there is a great abundance of channels, and source diversity, in cable and other technologies. The second, is that, from a First Amendment perspective, those cable channels are equivalent to broadcast stations, and therefore must be taken into account when determining the existence of scarcity.

Finally, the commenters flat out misread the Commission's position in *Syracuse*. While the Commission repealed the fairness doctrine on public interest and constitutional grounds, it did not rule that *all* public trustee regulation is constitutionally infirm. Indeed, the FCC found that it could still validly regulate broadcasters in the public interest. "Nothing in this decision...is intended to call into question the validity of the public interest standard under the Communica-

tions Act." *Id.* at 5055.[6]

The Commission itself stated only recently that its *Syracuse* decision did not eviscerate the rationale. In a pleading before the U.S. Court of Appeals for the D.C. Circuit, it declared:

> The fairness doctrine, however, intruded far more upon programming discretion than a requirement such as the prime time access rule, which is essentially a content-neutral economic regulation, designed to limit the power of the networks and promote diversity....Indeed, the Commission was careful to make clear that **its reasoning eliminating the fairness doctrine did not call 'into question the constitutionality** of [the FCC's] content-neutral, structural regulations designed to promote diversity.'

Answer of FCC to Petition for a Writ of Mandamus at 7, *In re: First Media Petition for Declaratory Ruling*, No. 94-1080 (D.C. Cir., filed March 23, 1994)[citation omitted, emphasis added.]

II. THE DEMAND TO USE THE ELECTROMAGNETIC SPECTRUM STILL EXCEEDS ITS AVAILABILITY, NOTWITHSTANDING THE INCREASE IN THE NUMBER OF BROADCAST STATIONS AND PENETRATION RATES OF CABLE AND OTHER ALTERNATIVE VIDEO DISTRIBUTION OUTLETS.

Like many opponents of broadcast regulation, the anti-PTAR forces here argue that the factual premises underlying the scarcity rationale are no longer accurate, and they reiterate those arguments in their comments. *See e.g.*, Freedom Forum Comments at 7-10; FEF Comments 12-15; First Media Comments to Declaratory Ruling. Even though the Supreme Court and Congress have specifically found on numerous occasions that the spectrum scarcity rationale remains valid, several parties urge that it is time to revisit the issue. They tirelessly recite a well-worn litany of allegations stating that the number of broadcast stations has increased, and that cable and other video distribution methods are on the rise, thereby rendering the scarcity rationale

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[6]Moreover, the D.C. Circuit, in affirming *Syracuse Peace Council*, declined to do so on constitutional grounds. The Court's affirmance was based solely on a finding that the FCC's ***policy judgment*** was within agency discretion. It specifically declined to affirm the constitutional issues raised by the Commission. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

obsolete.

But their arguments fall short in several ways. First and foremost, the Supreme Court has consistently maintained that the availability of speech outlets, rather than the absolute number of outlets, is what justifies broadcast regulations. Second, for various reasons, these parties overestimate the effect of alternative video distribution methods on the diversity of information sources that viewers receive. Finally, the record-high prices paid in the sale of stations and the fact that broadcast spectrum has been specifically exempt from auctions where non-broadcast spectrum has not, demonstrate that demand for broadcast spectrum still outpaces supply.

A. The True Inquiry Under Red Lion Is Whether The Number Of Persons Desiring To Speak Exceeds The Available Spectrum, Not Whether The Number Of Outlets Has Increased.

Opponents of PTAR point toward an increase in the number of broadcast stations and non-broadcast video delivery methods and conclude that these increased viewing choices render the notion of scarcity obsolete. Freedom Forum Comments at 7-10; FEF Comments at 9-10, 12-15; *see also*, First Media Comments and Reply Comments to PTAR Declaratory Ruling Proceeding.

But the mere increase in the number of broadcast stations is irrelevant for purposes of determining scarcity. *Red Lion* was not premised on the absolute number of available speech outlets, but rather on the notion that there are not enough frequencies to accommodate all those who would want to use this natural resource. "When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion*, 395 U.S. at 388; *see also, Turner*, 114 S.Ct. at 2456-57.

PTAR's opponents overlook the several instances in the past few years where the Supreme

Court and Congress, even while perfectly aware of an increase in the ***number*** of viewing choices, have explicitly affirmed the scarcity rationale. *See e.g., Red Lion; CBS v. Democratic National Committee*, 412 U.S. 94 (1973); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). MAP/PFAW have reviewed these findings at length both *infra*, at pages 13-15, and in previous comments. *See* MAP/PFAW Comments at 20-27; MAP Comments to PTAR Declaratory Ruling Proceeding at 18-22; MAP Reply Comments to PTAR Declaratory Ruling Proceeding at 19-21.

B. The Increase In The Number Of Available Sources Of Views And Information Is Not As Great As PTAR's Opponents Urge.

Several commenters cite an increase in the number of broadcast channels as proof that the days of scarcity are over. FEF Comments at 13; Freedom Forum Comments at 9. Additionally, FEF assigns importance to the increase in the number of non-broadcast video outlets such as cable, MMDS, and DBS. FEF Comments at 10; *see also*, First Media Comments to PTAR Declaratory Ruling Proceeding.

But the unique character of free, local, over-the-air broadcasting means that it cannot be lumped together with cable for purposes of assessing diversity. The Supreme Court found that broadcasting remains a "principal source of information and entertainment," *Turner*, 114 S.Ct. at 2469 (quoting U.S. v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)) and an important "outlet for exchange on matters of local concern." *Id.* "The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene." *Id.* Cable channels, unlike broadcast stations are not required by law to cover local issue. And, but a few exceptions, cable systems do not produce programming on local issues. *See* MAP

Comments at 24-25.[7]

Moreover, an abundance of cable channels and alternative video delivery systems are of no importance to the nearly forty percent of viewers who rely solely on over-the-air television. See *NOPR* at 6357; MAP/PFAW Comments at 19 (showing that at least some viewers will always rely on broadcast). The Supreme Court has recognized that these noncable households rely on broadcasting as their primary source of news and information, especially on local issues. *Turner*, 114 S.Ct. at 2470. The Commission should not overlook this significant percentage of viewers who still rely on PTAR to help promote their right to a diversity of views and information sources.

Nor do DBS and Wireless Cable systems yet supply much additional variety, and are unlikely ever to do so.[8] This is due in large part to their lack of penetration. At this point, DBS has fewer than one million subscribers, Mills, "Democrats Face Hard Fight in Defending Cable Rate Curbs," *Washington Post*, May 16, 1995 at E1, and wireless cable systems have only about

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[7]Evidence continues to accumulate showing that cable channels are no substitute for broadcast: a recent study found that 76 percent of viewers who watch specific programs said that major networks and affiliates carried most of the programs they want. National Association of Broadcasters & Network Television Association, "America's Watching: Public Attitudes Toward Television" at 9 (1995). Networks are by far the dominant choice for family viewership. 63% of parents surveyed said that when they last watched television as a family, they selected the major broadcast networks or their affiliates. Basic cable networks did not even come close, with only 13% of families watching. *Id.* at 5. Furthermore, 60 percent of the respondents in that study expressed concern that with the spread of cable the "best programs" would no longer be free, but would require additional fees. *Id.* at 11.

[8]It is also important to note that, from a viewpoint ***diversity*** perspective, one of the three national DBS services is owned by TeleCommunications, Inc. ("TCI"), the largest, and most vertically integrated, cable operator and programmer.

550,000.[9] *NOPR* at 6338. Furthermore, DBS and wireless cable do not carry local stations, and their programming is virtually identical to that seen on most cable systems. For example, TCI, the largest cable system operator in the United States, has a financial interest in 58 of the networks on Hughes' DirecTV. "Hundt Says PCS Auctions Will Be Model for Future Allocations," *Communications Daily*, April 5, 1995, at 5. And TCI's Chairman, John Malone, recently stated that, if "the price is right," the programming from these channels would be carried on MMDS systems as well. *Id.* *See also* MAP/PFAW Comments at 18.[10]

C. Congress Has Examined The Factual Premises Underlying *Red Lion* On Several Occasions And Has Found That The Demand For Spectrum Still Outweighs The Available Number Of Frequencies.

Few would seriously dispute - and, indeed, none of PTAR's opponents do - that there are still more people who want to broadcast over the airwaves than there are available frequencies. As MAP/PFAW have already demonstrated, the relevant committees in both houses of Congress have found this to be true time and time again. *See* MAP/PFAW Comments at 22-23. As recently as 1993, when the House Committee on Energy and Commerce recommended

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[9]Moreover, MAP/PFAW urges caution in accepting forecasts as fact. The *NOPR* accepts predictions of future sales by DBS and wireless operators as though they were inevitable facts. Opponents of PTAR then rely on these predictions as Commission-approved statistics. Yet industry predictions are still predictions. First, it is in these industry's interests to make optimistic forecasts. Second, there is strong reason to believe that more information is required; DBS and wireless are largely taking subscribers from cable operators instead of acquiring viewers who currently rely on free, over-the-air broadcast television.

[10]The Commission also alludes to the 24 pending applications of local telephone companies to provide "video dialtone" service "to a potential 8.5 million homes." *NOPR* at ¶20. As of this filing, however, there is an excellent chance that a number of the phone companies will withdraw these applications and choose not to provide video dialtone. "Bell Atlantic Plans Wireless For Video While Building Fiber Network," *Communications Daily*, May 18, 1995.

authorization of spectrum auctions for cellular telephone and personal communications services, it found:

> Radio frequency spectrum is a non-depletable natural resource and has finite boundaries....Currently, commercial and public safety users are finding a substantial shortage of frequencies available for assignment....especially in some urban areas where spectrum is in high demand by private sector and non-federal users....Given the current congested state of the spectrum, the ability to accommodate new spectrum-dependent technologies is severely limited.

H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 247-48 (1993).

The Committee flatly declared that new technology has not ended scarcity. It found instead that "major advances in technology....have increased significantly the demand" for spectrum and that this demand "has surpassed the availability." *Id.* at 263.

It is important to note in this regard that in authorizing auction of this spectrum, Congress specifically exempted broadcast spectrum, out of recognition of broadcasters's special role as public trustees. *See* 1993 Budget Reconciliation Act §115(j)(6)(B) *codified at* 47 U.S.C. §309(j)(6)(B). *See* MAP/PFAW Comments at 23; MAP Comments to PTAR Declaratory Ruling at 21.[11]

In considering legislation in 1989 to reinstate the fairness doctrine, the Senate Commerce Committee similarly concluded that spectrum was scarce, even in light of new technologies:

The Committee rejects arguments [that new technologies undercut the scarcity rationale]

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[11]In hearings before the House Subcommittee on Telecommunications and Finance on spectrum auctions, the National Association of Broadcasters urged that they should be excepted from spectrum auctions because they were subject to FCC regulations for programming in the public interest. "[T]here is a contract, we feel, with the Government that we're allowed to use that spectrum for the betterment of the community...." Hearings on H.R. 707 before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 103d Cong., 1st Sess. at 68 (Feb. 4, 1993)(statement of Ed Fritts, President, NAB); *see also Id.* at 32-33.

> for several reasons. First, scarcity is not a matter of the absolute number of broadcast outlets or new forms of electronic media; as long as more people seek licenses to use the spectrum than can be accommodated, there is scarcity. Second, as noted above, the arguments ignore the fact that broadcasters are statutorily obligated to serve as public trustees, and are granted the use of valuable resources. In return, they can and should be subject to modest requirements to assure that their trust is exercised in the public interest. Third, we disagree that scarcity is a thing of the past, even in absolute terms. Of these new technologies cited by the FCC, only cable television has begun to reach a significant number of households, and a great deal of what cable offers and what its audience watches is retransmitted "conventional" television stations.

S. Rep. No. 101-41, 101st Cong., 1st Sess. (1989) at 24. *See also*, Report of the Senate Commerce Committee on the Children's Television Act of 1990, S. Rep. No. 101-227, 101st Cong., 1st Sess. at 11 (1989); Report of the House Commerce and Energy Committee, H.R. Rep. No. 101-385, 101st Cong., 1st Sess. at 8-9.

D. That Demand For Broadcast Spectrum Continues To Exceed Supply Is Evidenced By The High Value The Market Places On Its Use.

The high and increasing prices marketplace actors pay for the right to use broadcast spectrum are further evidence that demand exceeds supply. "Spectrum is a scarce resource, and thus every exclusive license granted denies someone else the use of that spectrum. This is what gives spectrum a market value." H.R. Rep. No. 103-111 at 249. For example, licensee stations have recently sold for enormous sums:

- A.H. Belo purchased KIRO-TV in Seattle (12th largest market) for $162.5 million in cash. *Communications Daily*, Feb. 1, 1995, at 8.
- Granite Broadcasting purchased KBVO-TV in Austin (65th market) for $54 million. *Communications Daily*, Feb. 6, 1995, at 7.
- The sale price of a group of 6 stations in early April, in markets which ranged in number from 81st to 169th, was reported to be between $230 and 250 million. *Communications Daily*, Apr. 3, 1995, at 7.

See also, MAP Comments at 23-24; MAP Comments to PTAR Declaratory Ruling at 22.

There have been other indications of the high value that the market places on broadcast spectrum. For example, the recent auction of PCS licenses garnered nearly $8 billion for 99 licenses. "FCC Auction for PCS Licenses Ends with Proceeds Topping $7 Billion," *Communications Daily*, March 14, 1995, at 1. Broadcast spectrum, which is undoubtedly more valuable than nonbroadcast spectrum, would clearly bring in much more. The Office of Plans & Policy recently estimated that if the Commission were to auction the spectrum it recovers after the shift to advanced TV, it could realize between $11 and $132 *billion*. "Spectrum Auctions Could Raise up to $132 Billion, FCC Tells Senators," *Communications Daily*, May 24, 1995, at 2. Another source has estimated of the auction value of broadcast spectrum to be as high as $176 billion. Stern, "HDTV Spectrum May Be Auction Target," *Broadcasting & Cable*, March 27, 1995 at 9.[12]

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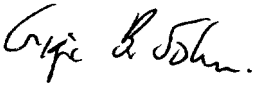
[12]Spectrum is likely to become even more scarce in the future. A recent NTIA report attempted to estimate the future increase in demand for spectrum. It predicted that an additional 700 MHz of spectrum could be required for industry and government uses over the next 10 years. "NTIA Predicts Increased Spectrum Demand by Wireless, Satellite Services," *Communications Daily*, April 10, 1995, at 4.

CONCLUSION

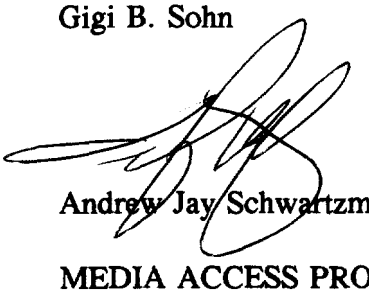
Whatever the Commission decides on the policy questions underlying PTAR, there is no basis upon which to eliminate it on constitutional grounds. In any event, the Commission should decline the invitation of several commenters to reject the entire public trustee rationale for broadcast regulation.

Respectfully submitted,

Joseph S. Paykel



Gigi B. Sohn



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